

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

OWP No. 90/2019

Reserved on : 16.08.2023

Pronounced on : 29.08.2023

Building Operation Controlling Authority
Municipal Area Jammu Through its Joint
Commissioner, Municipal Corporation, Town
Hall, Jammu

....Petitioner (s)

Through :- Mr. Rajnish Raina, Advocate.

V/s

Nageen Ara W/o Mansoor Ahmed Mir, R/
Village Sidhra, Jammu

....Respondent(s)

Through :- Mr. R.K.Jain, Sr. Advocate with
Mr. Pranav Jain, Adv.

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

29.08.2023

Prayer on behalf of the Petitioner:

1. The present writ petition has been filed by the Building Operation Controlling Authority through its Joint Commissioner, Municipal Corporation, Jammu. The petitioner has filed the present petition under Article 226 of the Constitution of India for issuance of an appropriate writ, order or direction seeking quashment/setting aside of the order dated 10.11.2017 passed by the Learned J&K Special Tribunal, Jammu, in file No.STJ/105/2017 titled Nageen Ara vs. Joint Commissioner. Besides, the petitioner by writ of mandamus, is seeking a direction to the respondents to demolish the unauthorized construction.

Arguments on behalf of the petitioner

2. Learned counsel for the petitioner submits that respondent claims to be owner in possession of plot measuring 5400 sqft situated at village Sidhra,

- Jammu and the respondent with intention to raise residential construction applied before the petitioner for grant of necessary sanction and accordingly, sanction was duly granted in favour of the respondent to raise residential construction vide sanction order No.62/BS/2016 dated 03.05.2016. Learned counsel submits that while raising the construction, the respondent committed violation of permissible coverage area, height and setbacks.
3. Further case of the petitioner is that the respondent started the construction against Master Plan and committed major violation. Accordingly, notice was issued vide No.MJ/CEO/46/01/2016 dated 14.03.2017 under section 7(1) of the Control of Building Operation Act, 1988, whereby the respondent was asked to show cause within 48 hours as to why the violations as mentioned in the said notice should not be demolished. Besides, a notice under section 12(1) of the Act was also issued, whereby, the respondent was directed to discontinue the operation of unauthorized construction. The learned counsel for the petitioner submits that respondent never replied the notices issued under section 7(1) of the Act, and accordingly, notice vide No.MJ/CEO/46/03/2017 dated 24.04.2017 under section 7(3) of the Act was also issued for demolition of the unauthorized construction. The respondent has challenged the said notice under section 7(3) of the Act by filing statutory appeal on 01.05.2017 before the learned J&K Special Tribunal, Jammu and the Learned Tribunal vide order dated 02.05.2017 directed the parties to maintain status quo.
4. The respondent (petitioner herein) responded to the appeal filed before the Learned J&K Special Tribunal, Jammu, and filed detailed status report

alongwith the rough sketch showing the violations committed. The petitioner further submits that the learned J&K Special Tribunal Jammu, without taking into consideration the fact that the Petitioner (respondent herein) has raised the construction without adhering the Master Plan, vide order dated 10.11.2017 has set aside the notice dated 24.04.2017 issued under section 7(3) of the Act, and compounded the construction.

5. The petitioner further submits that the impugned order suffers from serious infirmities and the core issue of the controversy has not been dealt with by the Tribunal. It is further submitted that the respondent herein has raised construction in utter violation of the sanctioned plan and has committed the violation of permissible coverage area and setbacks. It is further submitted that all the violations are major violations in terms of Master Plan. As per Regulation 11 of the J&K Control of Building Operation Regulations 1998, more than 10% of the permissible ground coverage, which as per the petitioner, is major violation and is not compoundable. It is submitted that the built up construction raised unauthorizably has been worked out as under:

| S. No. | Particular | Permitted by JMC vide number 62/BS/2016 Dt. 13.05.2016 | Constructed on site | Violations | |
|--------|---------------------|--|-----------------------------|-----------------------------|----------------------------------|
| | | | | In SFT | % exceed in ground coverage area |
| 1 | Plot Area | 5400 sft | | | |
| 2 | Coverage | | | | |
| | a) ground floor | 1768 sft | 3120 sft | 1352 sft | 25% |
| | b) first floor | 1485 sft | 3120 sft | 1635 sft | 30.2% |
| 3 | a) Front Set Back | 28'-6" | 17'-6" | 15'-0" | |
| | b)Rear set Back | 10'-0" | Varies from Nil to 7'-0" | Varies from 10'-0" to 3'-0" | |
| | c)one side set back | 11'-0" | Varies from 5'-0" to 14'-0" | Varies from 6'-0" to nil | |
| | d)other side | 6'-6" | Nil | 6'-6" | |
| 4 | Height | 30'-0" | 25'-0" | Nil | |
| 5 | FAR | G+1 | G+1 | | |
| 6 | Land use | residential | residential | | |

As per the detailed chat prepared by the petitioner, the total violation committed by the respondent is as under;

Total plot areas =5400 sft

Violation at ground floor =1352 sft

Violation at first floor =1635 sft

Total violation =2987 sft

6. The petitioner further submits that the powers which the learned Tribunal has exercised while dealing with the subject matter of appeal are totally perverse and accordingly has sought quashment of the same.

Arguments on behalf of the respondents:

7. Objections have been filed by Mr. Rajiv Jain, learned Senior Counsel for the respondent. The learned counsel submits that the High Court is only to correct the persons or the court exercising judicial or quasi judicial functions, when they assume jurisdiction which they otherwise do not possess or when they refuse to exercise jurisdiction, when it is vested in them by law or when in the exercise of their jurisdiction, they violate the principles of natural justice as such, writ petition against the order passed by the learned Appellate Tribunal is not maintainable.
8. Learned counsel for the respondent further submits that the order passed by the learned Appellate Tribunal neither suffers from any jurisdictional error nor outcome of patent illegality causing any grave miscarriage of justice to the petitioner. Moreso, when the appellate authority has passed detailed order in accordance with law on the basis of material facts brought on record before the Appellate Forum. It is also submitted that the appellant has invoked the extra ordinary jurisdiction of this Hon'ble Court

to challenge the order passed by the Appellate Tribunal, after more than one year which is an afterthought attempt on the part of the petitioner to drag the respondent in frivolous litigation. Thus the writ petition filed by the petitioner on the face of it, is hit by delay and laches and liable to be dismissed.

9. Learned counsel further submits that the petitioner has invoked the jurisdiction of this Hon'ble Court under Article 226 of the Constitution for quashment of order passed by the Statutory Appellate Authority and did not implead the said Appellate Authority as party respondent in the appeal. Otherwise also, no writ to invoke the private rights of the parties can be invoked under Article 226 of the Constitution of India.
10. Further case of the learned counsel for the respondent is that the answering respondent raised the residential construction as per the Site Plan sanctioned by the Competent Authority. It is vehemently denied that respondent has committed any violation of permissible coverage area, height and setbacks, as has been alleged by the petitioner. Learned counsel further submits that the Appellate Authority appreciated all the facts and the terms of the notice, issued under section 7(3) of the J&K Control of Building Operation Act, 1988 and has passed the order well within its jurisdiction.
11. Learned counsel further submits that the notice issued under section 7(1) of the J&K Control of Building Operation Act, 1988 was totally vague and did not mention about the extent of violations, so there was no occasion for the answering respondent to reply the said notice. It is further submitted that the answering respondent after receiving of the notice

dated 07.05.2017, filed an statutory appeal against the said notice before the Statutory Appellate Authority and categorically pleaded that even the notice dated 24.04.2017 issued under section 7(3) of J&K Control of Building Operation Act, 1988 is also vague as the violation alleged to have been made, have not been mentioned in the notice. It is further submitted that after the order passed by the learned Appellate Tribunal on 19th of November, 2017, the respondent approached the office of the petitioner vide communication dated 30.11.2017 and made prayer for accepting the compounding fee as per the order passed by the Appellate Authority, however, the petitioner-herein and its subordinate officials time and again made the respondent to believe that the compounding fee will be accepted by them, but adopted dilly-dally tactics in the matter on one pretext or the other. Learned counsel vehemently denied that the answering respondent committed major violation, as alleged in the petition. It is further submitted that the particulars with regard to extent of violation as mentioned in the petition, were neither incorporated in the notices issued under section 7(1) and 7(3) of J&K Control of Building Operation Act, 1988 nor were ever made known to the answering respondent upto the filing of the appeal by the answering respondent before the Statutory Appellate Authority and the petitioner has no right to improve its pleadings which were not made subject matter of the notices.

12. Learned counsel further submits that the answering respondent has raised residential structure and said structure neither violate any of the provisions of Master Plan nor the Zoning Regulations. It is further submitted that the petitioner has not appreciated the provisions of Control

of Building Operation Act, 1988 and its Regulations inasmuch as time to time judgments passed by the Apex Court as well as this High Court. The scope of re-appreciation of order passed by the Appellate Forum, in the writ of certiorari is very limited and such jurisdiction can be invoked in exceptional cases and not as a matter of course as a second appellate Forum.

Finding on Facts:

13. Heard learned counsel for the parties and perused the record available on the file.
14. I am of the view that the learned J&K Special Tribunal has taken note of all the aspects of the matter and directed compounding of the violations. I have also perused all the notices issued by the petitioner under section 7(1) and 7(3) of the J&K Control of Building Operation Act, 1988.
15. The record reveals that the respondent is owner of the plot of land measuring 5400 sft. The respondent had applied for permission of construction of residential construction which was granted by the authorities on 13.05.2016 to cover 1768 sft at ground floor and 1485 sft at first floor but he has exceeded in the covering area. It is not disputed that there is no change of land use as the permission was granted for residential construction. It is not disputed that constructions has been made after proper permission but the respondent has exceeded in the covering area. It appears that notices were issued only after two floor building was completed. The petitioner should have issued the notices at the time any violation on part of the respondent was found. It appears that the petitioner

has not mentioned the violations alleged to have been made by the respondent, in the notices issued by the petitioner.

16. It appears that though there is violation of permission granted by the petitioner herein with respect to the covering area, but the same cannot be termed as gross violation which cannot be compounded.

Legal Analysis:

17. The present writ petition raises disputed questions of fact which cannot be gone into while exercising the writ jurisdiction under Article 226 of the Constitution.
18. The High Court, when exercising jurisdiction to issue a writ of certiorari does not act either as a Court of Appeal or that of Revision and it has no power to correct either findings of fact or even errors of law except where the error of law is patent on the face of the record. The sole function of the Court is to correct the persons or Tribunals or Tribunals exercising judicial or quasi-judicial functions when they assume jurisdiction which they do not possess, or when they refuse to exercise jurisdiction which is vested in them by law, or when in the exercise of their jurisdiction they violate principles of natural justice.
19. It is also established principle of law that the Court while exercising writ jurisdiction under Article 226 of Constitution of India cannot go into the disputed questions of facts. This court while exercising the writ jurisdiction cannot go into the disputed question of fact as all the questions of facts have been dealt in detail by the learned Tribunal by adducing the evidence by passing a reasoned order.

20. This aspect of the matter has been decided by Hon'ble Apex Court in catena of judgments. Reliance has also been placed on judgment titled U.P. State Bridge Corporation v. U.P.Rajya Setu Nigam reported in 2004 (4) SCC 268. Hon'ble the Supreme Court in paragraph 14 has held as under:

“14. Finally, it is an established practice that the Court exercising extraordinary jurisdiction under Article 226 should have refused to do so where there are disputed questions of fact. In the present case, the nature of the employment of the workmen was in dispute. According to the appellant, the workmen had been appointed in connection with a particular project and there was no question of absorbing them or their continuing in service once the project was completed. Admittedly, when the matter was pending before the High Court, there were 29 such projects under execution or awarded. According to the respondent-workmen, they were appointed as regular employees and they cited orders by which some of them were transferred to various projects at various places. In answer to this the appellants' said that although the appellant corporation tried to accommodate as many daily wagers as they could in any new project, they were always under compulsion to engage local people of the locality where work was awarded. There was as such no question of transfer of any workman from one project to another. This was an issue which should have been resolved on the basis of evidence led. The Division Bench erred in rejecting the appellants submission summarily as also in placing the onus on the appellant to produce the appointment letters of the respondent-workmen.”

21. I am also fortified by the judgment of the Hon'ble Supreme Court reported as *2021 SCC Online 562 in case titled Shubash Jain vs. Rajeshwari Shivam and others*, whereunder the Hon'ble Apex Court has observed under:

“26. It is well settled that the High Court exercising its extraordinary writ jurisdiction under Article 226 of the Constitution of India, does not adjudicate hotly disputed questions of facts. It is not for the High Court to make a comparative assessment of conflicting technical reports and decide which one is acceptable.”

22. In light of what has been stated above coupled with the law laid down by Hon'ble the Supreme Court, the nomenclature of the petition or the nature of relief sought for by the petitioner is the determining factor to exercise the power and accordingly, would determine the jurisdiction to be

exercised by the High Court. This court can't exercise the power as an appellate court while exercising powers under Article 226 by re-appreciating the evidence which has been lead before the Learned Tribunal. The finding recorded by the Learned Tribunal is well reasoned and on the basis of evidence lead, I don't find any perversity in the findings recorded by the Tribunal which could be basis for exercising the extraordinary jurisdiction under Article 226 of the Constitution of India. There is no legal foundation of any perversity in the pleadings of the writ petitioner and rather the petition raises disputed questions of fact. The Learned Tribunal on the basis of evidence has recorded finding of facts and reached an appropriate conclusion which cannot be faulted on the mere asking of the party without any logical basis or reasoning.

23. The issue whether this court while exercising the power as a writ court can go into the questions of fact is no more *res integra* and can't assume the role of an appellate authority by re-appreciating the evidence to ponder as to what sort of violation has been committed in raising of construction, whether it was minor or major in nature, whether it was pre-sanctioned plan or revised plan. All these things can well be considered and appreciated by the Tribunal which can go into questions of fact after thorough enquiry. In the instant case, the Tribunal, after a thorough enquiry, has drawn the conclusions on a question of fact and recorded the finding about the nature of violation and regularize it under law by compounding the same. In my view, the Tribunal is fully competent to compound the violation keeping in view its nature and this court while exercising the writ jurisdiction cannot upset the findings of the Tribunal

based on appreciation of evidence. As a matter of fact, strictly speaking, the writ jurisdiction of the court cannot be invoked in such like matters as the dispute in question relates to a question of fact i.e whether the violation is minor or major and according to my view, **the Tribunal is a final arbiter in such like matters.** It goes without saying that the writ jurisdiction is invoked mainly where fundamental rights are infringed and for violating of legal rights too, such jurisdiction may be invoked only in the eventuality, where the alternate remedy is not available. In the instant case, alternate remedy which has already been availed on a disputed question of fact before the Tribunal which after appreciation of all the material facts and evidence on record has recorded the finding and thus the writ jurisdiction in the peculiar facts and circumstances, cannot be invoked against the said order.

24. Thus I hold that the writ petition is not a remedy in such like matters. This issue has been decided by the Division Bench of this court in case titled *Administrator, Municipality, Jammu, v/s M/s K.C. Hotels Private Limited and others reported as 1995 AIR (Jammu & Kashmir) 85* has been pleased to hold as under:

“20. In this appeal, we are not expected to go into a question of fact as to what sort of violation has been committed in raising of construction, and if any, whether it was as pre-sanctioned plan or revised plan, and whether it was minor or major in nature. All these things have been well considered by the Tribunal, which was required to go into such questions. The Tribunal has after a through inquiry come to the conclusions on a question of fact and recorded a finding about the nature of the violation, and regularized it under law by compounding the same. The Tribunal, in our opinion, is fully competent to compound the violation, keeping in view its nature, and if it is so, the learned single judge has not erred in upholding the findings of the Tribunal. The learned single Judge also appears to have considered the matter in its entirety in coming to the conclusion that the violations were of minor nature. As a matter of fact, strictly speaking, the writ jurisdiction of the High Court could not be invoked in such matters, as the dispute was in

substance relating to a question of fact. The Tribunal is the final arbiter in such matters. It appears to us a unique case where the Municipality itself has filed a writ petition against the order of Tribunal, perhaps to cover up its lapses and omissions/commissions. The writ jurisdiction is invoked mainly where fundamental rights are infringed. However, for violating of legal rights too, such jurisdiction may be invoked provided alternate remedy is not available. In the present case. The alternate remedy has already been availed of and even then on a disputed question of fact writ jurisdiction is sought to be invoked. Not only that, now Letters Patent appeal too has been filed and at the expenses of badly needed funds of the Municipality. It appears to us to be a litigation of attrition only for the purpose known to the Municipality only.”

25. This court in a judgment titled J&K Industrial & Technical Consultancy Organization Vs. R.K Bakshi and ors reported as 2018(2) JKJ 501, has observed as under:-

“10. Law is clear that disputed questions of facts cannot be adjudicated in writ petition, unless there is some grave perversity in the award. In present, case I do not find any perversity in the finding of facts recorded by the Tribunal.....”

26. Further the Hon’ble Supreme Court in State of U.P and anr. Vs. U.P Rajya Khanij Vikas Nigam; reported as (2008) 12 SCC 675 held as under:-

“41. Now, whether such action could or could not have been taken or whether the action was or was not in consonance with law could be decided on the basis of evidence to be adduced by the parties. Normally, when such disputed questions of fact come up for consideration and are required to be answered, appropriate forum would not be a writ court but a Labour Court or an Industrial Tribunal which has jurisdiction to go into the controversy. On the basis of evidence led by the parties, the Court/Tribunal would record a finding of fact and reach an appropriate conclusion. Even on that ground, therefore, the High Court was not justified in allowing the petition and in granting relief.

50. In our considered view, however, all such actions could be examined by an appropriate Court/Tribunal under the Industrial Law and not by a writ Court exercising power of judicial review under Article 226 of the Constitution. If the impugned action of the Corporation of retrenchment of several employees is not in consonance with law, the employees are certainly entitled to relief from an appropriate authority. If any action is taken which is arbitrary, unreasonable or otherwise not in consonance with the provisions of law, such authority or Court/Tribunal is bound to consider it and legal and legitimate relief can always be granted keeping in view the evidence before it and considering statutory provisions in vogue. Unfortunately, the High Court did not consider all these aspects and issued a writ of mandamus which should not have been done. Hence, the order passed and directions issued by the High Court deserve to be set aside.”

27. With a view to clinch the controversy in question, it would be apt to reproduce the statutory provisions of Control of Building Operations Act:-.

“13 Appeals

(1) An appeal against the order of an Authority made under [section 5 or] section 7 shall lie to such person as the Government may by notification in the Government Gazette, appoint in this behalf (hereinafter called ‘the Appellate Officer’) within seven days after the date of the aforesaid order of the Authority. The memorandum of appeal need not be accompanied by copy of order appealed from.

(2) Where any appeal is preferred from an order of an Authority, the appellate officer shall not stay the enforcement of that order unless the Authority concerned is given an opportunity of being heard:

Provided that where the erection or re-erection of any building was not completed on the day on which an order was made under section 7 for the demolition of such building the appellate officer shall not make any order for the stay of enforcement of such order unless such security, as may be sufficient in the opinion of the appellate officer, has been given by the appellant for not proceeding with such construction, erection or work pending the disposal of appeal.

(3) Every appeal under this section shall be disposed of by the appellate officer as expeditiously as possible.

(4) The costs of any appeal under this section shall be in the discretion of the appellate officer.

14. Bar of Jurisdiction

No court shall have jurisdiction to-

(a) Make any interim order whether by way of injunction or stay or in any other manner against the order of the Authority concerned or the appellate officer;

(b) Entertain any suit or proceeding in respect of demolition of any building

15. Finality of orders

Save as otherwise provided in this Act every order made by an Authority or the appellate officer shall be final and shall not be called in question in any suit, application or execution proceeding.”

28. In exercise of the powers conferred under section 19 of the J&K Control of Building Operations Act 1988, the Government has framed regulations known as J&K Control of Building Operations Regulations 1998.

“10. Offence to be cognizable

The Code of Criminal Procedure, Samvat 1989 shall apply to an offence punishable under section 9 as if it were a cognizable offence-

(i) For the purpose of investigation of such offences: and

(ii) For the purpose of all matters other than-

(a) Matters referred to in section 57 of the Code; and

(b) Arrest of a person except on the complaint of, or upon information received from the Authority concerned:

Provided that no offence of the contravention of any condition subject to which sanction was accorded for the erection or re-erection of any building shall be cognizable, if such contravention relates any deviation from any plan of such erection or re-erection sanctioned by the Authority concerned.

11. Lapse of sanction after three years

(1) Every sanction for the erection or re-erection of any building issued by the Authority shall remain in force for three years from the date of such sanction, but such lapse shall not bar for any subsequent application for fresh sanction under the foregoing provisions of this Act;

Provided the Minister shall always have power to revoke any sanction for erection or re-erection of any building at any time before the commencement of erection or re-erection of any building.

(2) Every order made by the Minister concerned under this section shall be final and shall not be called in question in any original suit, application or proceeding and no injunction shall be granted by any court in respect of any action under this Act.

(3) The provisions of this section shall have effect notwithstanding anything to the contrary contained in this Act or in any other law for the time being in force.

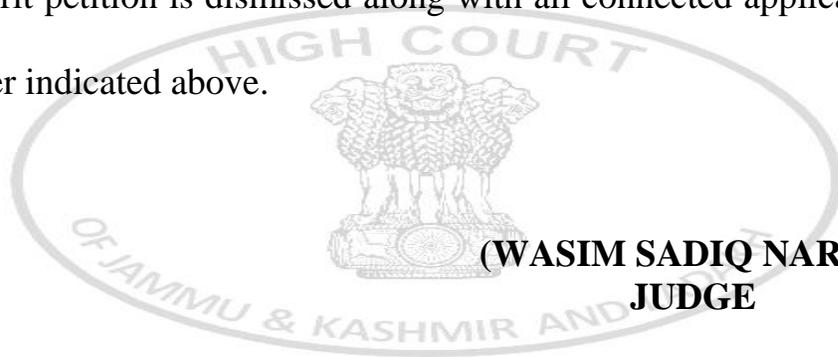
29. Thus from a bare perusal of the aforesaid statutory provisions / regulations, it is manifestly clear that once the appeal is decided by passing a final order, then there is no further remedy for the aggrieved party as envisaged under section 15 of the aforesaid Act and the order passed by the appellate Authority is final and shall not be called in question in any suit, application or execution proceedings. Once, there is specific bar to challenge the order passed by the appellate authority, then the filing of the writ petition under Article 226 to question the order on disputed questions of fact as an appellate authority to re-appreciate the evidence is not the remedy and is not permissible under law, which will be against the mandate and spirit of the procedure as envisaged under the aforesaid Act and Regulations. The law makers have deliberately not provided any further remedy against the order of the appellate authority with the sole object that the proceedings should culminate finally before

the Tribunal and the sword should not keep hanging on the person who has allegedly violated the provisions of the Act and he/she should have a sigh of relief. In case, if such writ petitions are allowed to be entertained under Article 226 on disputed questions of fact, then the very object of the scheme of the Act not to provide further remedy will be forfeited. Thus, unauthorized construction once compounded by the Municipal Authorities has the status of authorized construction and no proceedings in respect thereof can be initiated on the premise that the same is illegal and unauthorized by resorting to filing of writ petition under Article 226 of the Constitution of India.

30. Once the Tribunal has given finding by compounding the construction and then this court cannot go into the questions and reasoning which lead to the passing of the aforesaid order which is based on appreciation of evidence. This court does not have any mechanism or yardstick to go into the question of fact by conducting enquiry with respect to the fact whether there is any minor or major violation, as alleged by the petitioner. This court while exercising the powers under writ jurisdiction cannot re-appreciate the evidence by way of an appellate authority to go into the disputed questions of facts which have been arrived at by the Learned Tribunal after appreciating all the material facts and record and adducing evidence. This Court can't assume the power/role of Commissioner to go on spot to verify whether it is major or minor violation, which falls within the realm of disputed question of facts and the Tribunal being the arbiter in such like matters has the final authority and the finding recorded by the Tribunal can't be upset in writ jurisdiction.

Conclusion:

31. In light of the aforesaid legal position and the peculiar facts and circumstances of the present case, no case of interference by this court has been made out in this case. Therefore, I do not find any legal infirmity in the impugned order dated 10.11.2017 passed by J&K Special Tribunal, Jammu, which is well reasoned and has been called in question in the instant petition. The challenge thrown by the petitioner to the same under Article 226 of Constitution of India, is devoid of any merit and hence rejected for the reasons stated hereinabove. Resultantly, the order dated 10.11.2017 passed by J&K Special Tribunal Jammu is upheld.
32. The writ petition is dismissed along with all connected applications in the manner indicated above.



(WASIM SADIQ NARGAL)
JUDGE

Jammu:
29.08.2023
G. Nabi/Secy

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|----------------------------------|-----|
| Whether the order is speaking? | Yes |
| Whether the order is reportable? | Yes |